**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MANDI D. LAMBERSON** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | Docket No. **1,030,770** |
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| **FALLEY'S, INC.** | ) | |
| Self-Insured Respondent | ) | |

## ORDER

Self-insured respondent requests review of the December 22, 2011 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 3, 2012.

### APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Karl Wenger of Kansas City, Kansas, appeared for the self-insured respondent.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

It was undisputed that claimant suffered a work-related accidental injury when a door she was opening to enter a room suddenly stopped and struck her in the face. Claimant was provided medical treatment including surgeries to repair her broken nose. But respondent disputed whether claimant suffered any permanent impairment from the accidental injury. Claimant's medical expert, Dr. Peter Bieri, opined claimant suffered a 10 percent whole person functional impairment. At the regular hearing, the parties stipulated that the treating physician, Dr. J. David Kriet, had opined claimant did not suffer any permanent impairment as a result of her injuries.

The Administrative Law Judge (ALJ) adopted Dr. Bieri's opinion and found claimant sustained a 10 percent whole person functional impairment. The ALJ concluded Dr. Kriet's

opinion was not credible because there was no record the doctor examined claimant for rating purposes and no indication that his opinion was based upon the AMA *Guides*.[1]

Respondent requests review of the nature and extent of claimant's disability. Respondent argues that the ALJ erred in disregarding Dr. Kriet's opinion that claimant did not suffer any permanent impairment as a result of her work-related injury. Respondent further argues that claimant waived any foundation objections to Dr. Kriet's rating opinion when she stipulated the doctor had opined claimant did not suffer permanent impairment. Consequently, respondent argues it was improper for the ALJ to use the AMA *Guides* requirement to undermine Dr. Kriet's rating. Finally, respondent requests the Board to adopt Dr. Kriet's opinion that claimant did not suffer any permanent impairment as a result of her accidental injury.

Claimant argues that Dr. Kriet's opinion was not credible and therefore the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's disability, if any.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant described her July 26, 2005 accident:

> I broke my nose. I was walking into the office and we were busy that day and I worked as a bookkeeper. And as I opened the door, which is a big hard wooden door, you have to unlock it and turn the knob at the same time. And as I was opening it, I was walking in as I opened it and one of the manager's was standing right behind the door. The door stopped and I smacked my face on the door.[2]

Claimant reported her injury to her supervisor. Medical treatment was provided by respondent at St. Francis Hospital's emergency room. Claimant was told she had torn nasal cartilage but no bony fracture. She was then referred to Topeka Ear, Nose and Throat. Claimant was not able to breathe out of her right nostril and she gradually lost her

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[2] R.H. Trans. (Mar. 27, 2009) at 9-10.

sense of smell. In May 2006, Dr. Michael Franklin performed surgery on claimant's nose. After a post-surgery follow-up visit, Dr. Franklin released claimant from his care.

Claimant continued to have problems with not being able to breathe out of the right side of her nose and her nose was still crooked. Dr. Peter Bieri, a board certified disability evaluator, met with claimant on October 9, 2006, at claimant's attorney's request. The doctor reviewed claimant's medical records and also took a history from her. Claimant had complaints of nasal obstruction and discomfort as well as nasal deformity. Upon physical examination, Dr. Bieri found claimant had a deviated nasal dorsum which was more to the right than the left, a prominent nasal hump secondary to bony scarring and a bilateral septal deformity with a small perforation involving the cartilaginous portion of the septum. The doctor recommended a surgical consultation to consider possible repair of the nasal septum perforation and nasal reconstruction to correct the bony deformity.

Ultimately, claimant was referred to Dr. Kriet at the KU Medical Center. In July 2007, Dr. Kriet performed surgery on claimant's nose. Claimant had follow-up visits after surgery with Dr. Kriet at the following intervals: a week, two weeks, six months and a year. She last saw Dr. Kriet on July 8, 2008, and a follow-up visit was scheduled for a year later but wasn't kept. Claimant testified that after Dr. Kriet's surgery she is able to breathe better but she is not back to 100 percent. And she noted her nose was only a little bit crooked. But at claimant's last visit with Dr. Kriet she was informed that she still had a hole in her septum. Claimant testified that because of the hole in her septum her nose drys out easily and she applies Vaseline or a triple antibiotic ointment to her nose with a Q-tip in order to keep it moist.

On July 28, 2008, claimant was examined and evaluated again by Dr. Bieri. Upon physical examination, the doctor found claimant had a healed septal perforation, a straight nasal dorsum with no significant nasal obstruction and evidence of surgical removal of bone and scar tissue. Dr. Bieri opined claimant had reached maximum medical improvement. Dr. Bieri determined claimant had a Class 2 facial impairment using page 229 of the AMA *Guides.* The doctor noted a Class 2 impairment has a range of 5 to 10 percent whole person. He further noted Class 2 is appropriate when there is a loss of supporting structure of part of the face and he felt claimant met the criteria for Class 2 and he provided the maximum rating of 10 percent.

Dr. Bieri noted claimant had partial internal nose blockage. But he further noted claimant had a healed septal perforation which he described as a hole in the nasal septum which supports the anterior of the nose. Dr. Bieri also noted claimant had some asymmetry of her nose but did not think she had a cosmetic defect.

On cross-examination Dr. Bieri testified that he gave claimant the maximum of the 5 to 10 percent range because there is a section of the AMA *Guides* that provides unless

there is evidence to the contrary a claimant is to be provided the maximum percent of the AMA *Guides*. But Dr. Bieri agreed that provision was not listed under the section he used and it dealt with another part of the AMA *Guides*.

Claimant continued to experience problems with dryness in her nose during the winter which led to nose bleeds if she did not apply ointment. Consequently, the question arose whether claimant needed additional treatment. Claimant had testified that at her last visit with Dr. Kriet she had been told that repair of the hole in her septum would be a complicated surgery.

A workers compensation claim representative on behalf of respondent sent a letter to Dr. Kriet, dated February 23, 2009, that provided in pertinent part:

> It is our understanding that Mandi Lamberson has been released from medical care for the work-related nose fracture she sustained on September 6, 2005. We ask that you forward your final medical report including whether Ms. Lamberson has sustained any permanent disability or has any permanent restrictions as a result of this injury.[3]

The letter was returned to respondent's representative with a date stamp indicating it was received on March 4, 2009. And the letter had written on it "no permanent disability."

The case proceeded to regular hearing on March 27, 2009, and after an off the record discussion at the conclusion of the hearing the ALJ noted that he was appointing a doctor to perform an independent medical examination. On April 1, 2009, the ALJ ordered an independent medical examination by Dr. Lynn Curtis to make recommendations whether any future medical treatment was appropriate and to determine a disability rating.

Dr. Curtis reviewed medical records, took a history from claimant and also performed a physical examination of claimant on May 12, 2009. At the time of the doctor's evaluation, claimant had scarring and purulence or infection on the proximal septum on the right medial side of the nares or passageway. Dr. Curtis was not able to visually see the septal wall hole due to drainage and scarring. The doctor diagnosed claimant with a deviated septum, lack of smell and distal nerve innervation in the nose, status post initial repair in 2006, second repair in 2007, residual septal defect and recurrent nasal bleeding. Dr. Curtis noted that claimant was not at maximum medical improvement because Dr. Kriet had planned to see claimant in 2009. Consequently, Dr. Curtis deferred all the questions regarding claimant to Dr. Kriet. Based upon that response it does not appear Dr. Curtis was provided the letter on which Dr. Kriet had written "no permanent disability."

[3] R.H. Trans. (Nov. 21, 2011) Resp. Ex. A.

Claimant did not return to see Dr. Kriet and the case proceeded to a second regular hearing on November 21, 2011.[4] At the start of the hearing the following colloquy occurred:

> **JUDGE AVERY:** Let's go back on the record. The Court in trying to clarify Respondent Exhibit A would note this was a letter addressed to Dr. Kriet, K R I E T, regarding what, if any, permanent impairment -- is it he or she?
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> **THE CLAIMANT:** The doctor?
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> **JUDGE AVERY:** Dr. Kriet, is it a she?
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> **THE CLAIMANT:** He.
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> **JUDGE AVERY:** What, if any, impairment Dr. Kriet had assigned the Claimant. There is on Exhibit A a three-word notation saying no permanent disability. The parties have stipulated that that is Dr.Kriet's finding regarding the Claimant's permanent partial disability. Is that correct?
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> **MR. FINCHER:** Yes, Your Honor.
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> **MR. WENGER:** That's correct, thank you.[5]

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[6]

A treating surgeon, Dr. Kriet, on a letter asking whether claimant had any disability, wrote claimant had no permanent disability as a result of her accidental injury. Conversely, claimant's medical expert, Dr. Bieri, opined claimant suffered a 10 percent whole person functional impairment. Dr. Kriet last saw claimant on July 8, 2008. Dr. Bieri last saw claimant on July 28, 2008.

The ALJ determined Dr. Kriet's opinion was not credible because there was no reference that the doctor's opinion was based upon the AMA *Guides* and the doctor never later examined claimant specifically for a permanent impairment evaluation. The Board

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[4] The delay in the litigation after receipt of Dr. Curtis' independent medical report is unexplained.

[5] R.H. Trans. (Nov. 21, 2011) at 6-7.

[6] K.S.A. 44-510e(a).

disagrees. Initially, it was undisputed that Dr. Kriet's opinion was stipulated to by the parties. Consequently, claimant waived any foundation objections such as whether the opinion was pursuant to the AMA *Guides*. Therefore, Dr. Kriet's opinion was properly part of the evidentiary record. Secondly, the ALJ noted Dr. Kriet never specifically saw claimant for a disability evaluation, but as previously noted, both Drs. Bieri and Kriet last saw claimant in July 2008. And Dr. Kriet had performed the surgery on claimant and had seen her at follow-up examinations until a year after the surgery was performed. Dr. Kriet's opinion was based upon seeing claimant during the same time frame that Dr. Bieri examined claimant. Based upon that scenario it cannot be said Dr. Kriet's opinion was faulty for failure to again see claimant for a rating evaluation.

Both doctors based their opinions upon seeing claimant in July 2008. Dr. Kriet had seen claimant more times than Dr. Bieri. And Dr. Bieri agreed the range for claimant's rating was from 5 to 10 percent but he always gave the maximum in a range.

Although Dr. Curtis did not provide an opinion regarding claimant's impairment, if any, he examined claimant on May 12, 2009 and detailed his physical findings. As previously noted Dr. Curtis diagnosed claimant with a deviated septum, lack of smell and distal nerve innervation in the nose, with a residual septal defect and recurrent nasal bleeding. Dr. Curtis further noted that he did not think claimant's smell or peripheral nerve injury would ever recover. These findings tend to refute Dr. Kriet's opinion that claimant did not have any permanent disability. Based upon a review of all the medical evidence regarding claimant's impairment, the Board finds that Dr. Bieri's opinion is the most persuasive and affirms the ALJ's finding claimant suffered a 10 percent whole person functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 22, 2011, is affirmed.

**IT IS SO ORDERED.**

[7] K.S.A. 2010 Supp. 44-555c(k).

Dated this 17th day of May, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant, rdfincher@ksjustice.com
Karl Wenger, Attorney for Respondent, kwenger@mvplaw.com
Brad E. Avery, Administrative Law Judge